Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 207 of the Communications Act of 1996	)	
	)	**CS Docket No. 96-83**
Restrictions on Over-The-Air Reception Devices: Television Broadcast and Multichannel, Multipoint Distribution Service	)	

To: The Commission

COMMENTS OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

The American Radio Relay League, Incorporated (the League), the national association of Amateur Radio Operators in the United States, by counsel and pursuant to the *Notice of Proposed Rule Making* (the Notice), FCC 96-151, released April 4, 1996, hereby submits its Comments. The Notice proposes a specific rule, pursuant to the requirements of Section 207 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996)(the "Telecomm Act"), which would protect the ability of the public to receive over-the-air television and MMDS broadcasts via functional outdoor antennas. In support of the proposed rule, and the implementation of Section 207 of the Telecomm Act, the League states as follows:

1. The Telecomm Act, at Section 207, directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer's ability to receive video programming from over-

the-air broadcast stations (TV), direct broadcast-satellite services (DBS), or multichannel, multipoint distribution services (MMDS). The Commission's obligation under this statutory provision is unconditional, and would apply on its face to both municipal land use restrictions and private land use regulations.

2. The Commission's proposed rule, set forth at Appendix A of the Notice, would create a presumption of unreasonableness and preemption with respect to any state or local zoning, land-use, building, or similar regulation which affects the installation, maintenance or use of devices for over-the-air reception of television broadcast signals or MMDS service.[1] It would preclude enforcement of any such regulation, unless the state or municipal land-use authority obtains a waiver from the Commission. Specific waiver criteria are set forth, as are procedural obligations and the conditions under which the Commission would consider grant of such a waiver. With respect to private deed restrictions on TV or MMDS antennas, the Commission establishes the invalidity of (by rendering unenforceable) any restrictive covenant, encumbrance, homeowner's association rule, or other non-governmental restriction which would impair a viewer's ability to receive video programming signals from over-the-air TV or MMDS stations. The Notice asks whether these provisions will enhance viewer's ability to receive video programming.

3. The League, as the principal representative of the interests of the Amateur Service in the United States, is uniquely qualified to comment in this proceeding on behalf of the interests

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[1] DBS antenna regulation, municipal and private, is addressed in a separate proceeding. See, the *Report and Order (and) Further Notice of Proposed Rule Making*, FCC 96-78, released March 11, 1996 in IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93.

of its members. Amateur radio stations, almost exclusively operated from the residences of the Commission's amateur licensees, require outdoor antennas, as do most television viewers and MMDS subscribers. Radio amateurs are subjected to restrictions, both governmental and private, similar or identical to those which affect or proscribe the installation and maintenance of outdoor television and MMDS antennas. In addressing the difficulties that amateur radio licensees have had in installing and maintaining effective, functional amateur radio antennas in residential areas, the Commission established a preemption policy addressing generally the limitations on local zoning authority over amateur radio antennas.[2] The policy addressed only governmentally imposed land use regulations; it did not preempt private land use restrictions on amateur antennas, based on the assumption that private land use restrictions were based on private agreement between buyer and seller of land. The amateur antenna preemption policy has been a reasonable catalyst in promoting compatible antenna zoning policies on the part of some municipalities. It is either ignored or misinterpreted in other instances, and some municipalities have affirmatively sought to avoid any accommodation for licensed radio amateurs, as the Commission's policy requires. For that reason, the League has requested certain clarifications and amendment of the Commission's amateur antenna preemption policies.[3] The League's

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[2] Amateur Radio Preemption, 101 FCC 2d 952 (1985); codified at 47 C.F.R. Section 97.15(e). The declaratory ruling is often referred to as "PRB-1", the FCC file number for the notice and comment proceeding that led to the issuance of the ruling.

[3] The League filed, on February 7, 1996, a Petition for Rule Making, RM-8763, seeking certain clarifications and modifications to the amateur preemption policy. This Petition was placed on public notice February 21, 1996, and comments were due thereon 30 days thereafter. The Commission has taken no action thereon to date.

interest in this proceeding is unrelated to the portion of the proposed TV and MMDS preemption rule dealing with governmentally imposed ordinances and statutes. Radio amateurs have a preemption policy that differs from that proposed rule. What is of utmost concern to radio amateurs in this proceeding, however, is the need to insure that effective, functional outdoor antennas are not precluded by deed restrictions or homeowner's association regulations.

4. The League, and its representatives, have done significant research as to the pervasiveness of covenant regulation of outdoor antennas in recent years. Studies by radio amateurs of private deed restrictions in new housing developments in Los Angeles County, California, Orange County, California, San Francisco, California, Dallas, Texas and other metropolitan areas reveal that private deed restrictions of antennas in new housing developments are so pervasive that it is virtually impossible to purchase a new home without either a direct prohibition, or a prior consent requirement, before any outdoor antenna of any type is permitted. As the Commission has noted, these restrictions, being initially imposed by developers of land, are purely aesthetically based. While such is not necessarily the case with zoning or building code restrictions, covenant or deed restrictions are based on inchoate aesthetic judgments which do not take into account the communications needs of the resident.

5. While any discussion of covenant regulation of antennas is necessarily anecdotal or generalized, it is useful to discuss some examples of these regulations, in order to see the need for the exact type of preemption policy proposed by the Commission relative to private land use regulation. There is a limited number of configurations of covenant regulations governing outdoor antennas. The most common currently, in the League's experience, is a complete prohibition on outdoor antennas anywhere in a regulated subdivision. This type of covenant has

two theoretical bases: 1) it is necessary to preclude all types of outdoor antennas in order to preclude any particular types; and 2) it is unnecessary to have antennas outdoors if cable television service is available. With respect to the second theory, certain covenants, notably those in eastern beach resorts, contain a common provision that there can be installed no outdoor antennas as long as cable television service is available in the subdivision. This, of course, favors one video service provider over another, and restrains competition in video delivery, *contra* express Commission policy.[4]

6. The direct result of private land use regulation or prohibition of outdoor antennas is the preclusion in many areas of off-air television viewing. It precludes any "wireless cable" use, because an outdoor antenna is an absolute requirement for MMDS reception, and, even in metropolitan areas near broadcast transmitters, outdoor antennas are required to reject ambient noise and to insure a reasonable signal-to-noise ratio for the viewer. This is especially true with the constant increases in RF sources in residential neighborhoods, and the need to overcome such.

7. Other types of private land use restrictions require the advance approval of a homeowners' association before an antenna (or, typically, any other "structure") is installed on the land. These restrictions, premised on the maintenance of the "character" of the neighborhood or the promotion of "sameness" in the lifestyle of the residents of a subdivision, subject the residents to a choice of video delivery dictated by neighbors, almost always without standards

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[4] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *New York State Commission on Cable Television v. Federal Communications Commission*, 749 F.2d 804 (D.C. Cir. 1984).

for determining whether an outdoor antenna will be permitted or not. There is no way that a resident can determine whether his or her antenna proposal will be approved in advance of making application therefor, and the proposal can be denied without any basis whatsoever.

8. A third type of private deed restriction often encountered would require antennas to be shielded from view, often by shrubs, or by location on a residential lot so that the antenna cannot be seen from neighboring parcels or from a public right-of-way. These provisions, derived from satellite dish ordinances, may be reasonable for ground-mounted antennas, but are inapplicable to those types of antennas, such as TV or MMDS antennas, that require certain height and clearance from obstructions, in order to be basically functional. The application of criteria for approved installation of outdoor antennas that plainly cannot be complied with would be distinctly unreasonable and should be preempted; such criteria constitute a prohibition of outdoor antennas to the same extent as do direct prohibitions in deed restrictions. Furthermore, the cost of attempted compliance with such restrictions often is far in excess of the cost of installing the antenna.

9. Finally, as is the case with respect to satellite dish antennas, some approval processes, through homeowner's associations or architectural control committees in subdivisions, provide procedural impediments to installation of outdoor TV or MMDS antennas. The approval processes are delayed; unreasonable expenses (for vegetative shielding, etc.) are imposed on the resident who seeks to install a simple outdoor antenna; or approvals are conditioned on certain other unreasonable requirements. Denial of authority to construct, even if arbitrarily determined, is virtually impossible for an ordinary homeowner to contest; most covenant restrictions provide

that attorney's fees of the homeowner's association are to be paid by the challenger to a decision of the association, unless the challenge is successful.

10. The League's principal interest in this proceeding is with respect to the proper limitation of private deed restriction of TV or MMDS reception antennas. However, in considering the municipal land use regulation of those antennas, there are some fundamental considerations. Like those of other radio services, TV and MMDS antennas require certain heights and configurations in order to be effective. Certainly, no state or municipal land use restriction of any type should limit antenna installation, maintenance or operation so as to prohibit, or render ineffective, any such antenna, directly or indirectly. In the League's rather extensive experience with both governmental and private land use regulation of outdoor antennas, zoning and building code regulations are usually silent with respect to TV and MMDS type antennas, save for the need for certain height. Of the two types of antenna regulation, however, the more severe by far is the explosive proliferation of private land use restriction of TV, MMDS, DBS, and other types of antennas, including amateur radio antennas. These arbitrary and intrusive restrictions necessitate that, at the least, section (c) of the Commission's proposed rule, which would preempt all restrictive covenant regulation of TV and MMDS antennas which impair a viewer's ability to receive video programming signals from over-the-air television broadcast or MMDS service, be implemented immediately.

11. The Commission has clear jurisdiction, aside from the statutory mandate of Section 207 of the Telecomm Act, to implement the proposed rule, with respect to covenant restrictions. As long as agreements between private individuals are effectuated by voluntary adherence to their terms, there is no action by the State and provisions of the United States Constitution are

not violated. However, if State courts attempt to enforce deed restrictions, the action of the State constitutes state action. *Shelley v. Kraemer*, 334 U.S. 1, at 13-14, 19-20 (1948). Thus, covenant regulations, if judicially enforced, are subject to the same constitutional limitations which would affect state or municipal governmental regulations. Judicial enforcement of a covenant which violates specific Federal communications policy is therefore preempted under the Supremacy Clause of the Constitution, Article 6, Clause 2, to the same extent that the same restriction, if a State or local statute or ordinance, would be preempted. Since the proposed rule would establish unequivocal Federal Communications Policy, it is within the Commission's jurisdiction under any circumstances to preempt restrictive covenant regulation of antennas. This specific point has been determined by at least one appellate Court in California. *Hotz v. Rich*, 6 Cal. Rptr 2d 219 (Cal. App., 1st Appellate District, March 4, 1992). Furthermore, if a state regulates interstate commerce in a manner inconsistent with that prescribed by Congress, the state regulation is preempted by the federal law, and is therefore Constitutionally impermissible. *Hyde Park Partners, L.P. v. Connolly*, 839 F. 2d 837, 843 (1st Cir. 1988).

Accordingly, for the reasons stated hereinabove, the American Radio Relay League, Incorporated respectfully requests that the Commission proceed with the early enactment of the

proposed rule; and that most especially, subsection (c) thereof, with respect to the covenant regulation of TV or MMDS antennas.

Respectfully submitted,

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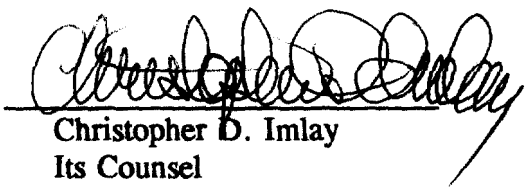
By 
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May 6, 1996